Supreme Court, U.S.
FILED
JUL 23 1991
OFFICE OF THE CLERK

No. 90-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOANIKEALA AKAKA., *et al.*,
Petitioners,

v.

DOCTOR NUI LOA PRICE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER R. SCHOETTLE
Attorney at law
Counsel of Record for Respondents Doctor Nui Loa Price and The Hou Hawaiians

KAMUELA PRICE, *pro se*

Suite 1012
1088 Bishop Street
P. O. Box 596
Honolulu, Hawaii 96809
Telephone: (808) 537-3514

TABLE OF CONTENTS

SCOPE OF RESPONSE. 1

COMMENTS ON MISSTATEMENTS IN PETITIONERS' STATEMENT OF THE CASE 2

a. Complaint alleges specific breach of trust 2

b. Respondents do not concede that Petitioners "have" qualified immunity 2

c. The questions presented for review were not adequately raised in the courts below 5

QUESTION ONE 7

QUESTION TWO 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES:

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). 11

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, (1957) 9

Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 2

Nix v. Norman, 879 F.2d 429 (8th Cir. 1989) 9

Wells v. Brown, 891 F.2d 591 (6th Cir. 1989) 9

CONSTITUTIONAL PROVISIONS

Haw. Const. (1978), art. XII 3

STATUTES

Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) § 5(f) . . . . . passim

H.R.S., Chapter 10 . . . . . 3, 4

H.R.S. § 10-2 4

H.R.S. § 10-3(1) 4

H.R.S. § 10-3(2) 4

H.R.S. § 13.5 4

H.R.S., Chapter 13D 4

H.R.S. §13D-3(b)(1) 4

Hawaii Session Laws (1991), Act 304 4

RULES OF COURT:

F.R.Civ.Proc., Rule 8(a) 8

Rev. Rules of the Supreme Court, Rule 14.1 (a) 2

ATTORNEY GENERAL OPINIONS:

Haw. Att. Gen. Op. No. 83-2 (1983) 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOANIKEALA AKAKA *et al.*,

Petitioners,

v.

DOCTOR NUI LOA PRICE *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondents, DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS, a native Hawaiian Ohana, and KAMUELA PRICE, respectfully pray that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

SCOPE OF RESPONSE

The first question presented for review by the Petition is whether it is necessary in a personal capacity suit against state officials to specifically allege that the officials are being sued in their individual capacities. This is a very narrow question that applies to a very broad class of civil rights cases.

Yet in discussion of this issue, Petitioners have devoted a very large portion of their brief to a discussion of their interpretation of native Hawaiian rights

under § 5(f) of the Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) and the Hawaii Constitution.

Rule 14.1 (a) of the Revised Rules of the Supreme Court provides, in part, as follows:

> "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."

While the purpose of the Office of Hawaiian Affairs and the extent of native Hawaiian rights may be important issues worthy of review by this Court, they simply are *not* subsidiary questions, fairly included within the statement of the first question presented for review.

On the other hand, these issues might be considered subsidiary to the second question presented for review. A review of the rights of native Hawaiians and duties of Petitioners under § 5(f) must be made in order to determine whether Petitioners have qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). However, the issue of qualified immunity was not raised below until the Petition for Rehearing in the Court of Appeals. Therefore, the defense was waived below.

While Respondents do not agree with much of the argument contained in the Petition with respect to rights of native Hawaiians, we have limited our response to those issues to the extent necessary to address the questions presented for review.

COMMENTS ON MISSTATEMENTS IN PETITIONERS' STATEMENT OF THE CASE

A. Complaint alleges specific breach of trust. On page 7 of the petition, Petitioners state:

> "None of the complaint's operative allegations, particularly those relating to the breach of § 5(f), *simpliciter*, contained specific information of what had been done or not done to cause the breach . . . ." Pet., p. 7.

This statement is incorrect. The allegation of a specific breach of trust is contained in paragraph 16 of the complaint, as follows:

> "16. On information and belief, [Petitioners] have expended portions of the TRUST INCOME for uses other than those purposes permitted by § 5(f) of the Admission Act, and in particular, *have expended said TRUST INCOME for the benefit of persons denominated as "Hawaiians" who are persons of less than 50% Hawaiian ancestry and who are not beneficiaries of the § 5(f) Trust.*" Pet. App. p. 32a.

A discussion of distinction between the terms "native Hawaiian" and "Hawaiian" is necessary to a complete understanding of this allegation.

When Hawaii became a state, in 1959, most of the public lands in the Territory were given by Congress to the new state, under terms of a trust established by § 5(f) of the Admissions Act. One of the beneficial purposes of said trust was "for the betterment of the condition of native Hawaiians". The term "native Hawaiian" was defined by reference to the Hawaiian Homes Commission Act, as an Hawaiian of 50 per cent, or more, aboriginal blood. There are less than 25,000 native Hawaiians alive today.

In 1979, OHA was established by Hawaii Revised Statutes, Chapter 10, pursuant to Article XII of the 1978 Constitution of the State of Hawaii. OHA is governed

by a Board of Trustees, elected pursuant to Hawaii Revised Statutes, Chapter 13D. Electors for the office of Trustee of OHA must satisfy the qualification of being "Hawaiian." **H.R.S.** §13D-3(b)(1). There is no definition of the term "Hawaiian" in Chapter 13D.

OHA is funded with 20 percent of the income from the §5(f) trust; **H.R.S.** § 13.5, 10-2, as amended by Session Laws of 1991, Act 304, §§ 3 & 7); but charged with the duty of bettering the conditions of both "native Hawaiians" and "Hawaiians". **H.R.S.** §10-3(1) & (2), as amended by Session Laws of 1991, § 4. For purposes of **H.R.S.**, Chapter 10, "native Hawaiian" means a Hawaiian of 50 per cent or more aboriginal blood; and "Hawaiian" means any descendent of the aboriginal peoples of the Hawaiian Islands. **H.R.S.** §10-2, as amended by Session Laws of 1991, Act 304, § 3. The number of "Hawaiian" beneficiaries that OHA claims to represent is more than 250,000, and is ever growing larger.

Given this conflict of interest between Hawaiian and native Hawaiian beneficiaries, it was not surprising that, on May 21, 1988, the Petitioners, meeting in Hilo, Hawaii, adopted a resolution calling for a vote by "Hawaiian" voters on the question of whether there should be a single class of beneficiaries for a trust they described as "the OHA trust." [1]

In total disregard of their duties as trustees and the rights of native Hawaiians under the § 5(f) trust, OHA used §5(f) income to promote the single definition that would include "Hawaiians" as beneficiaries of the "OHA trust." [2]

---

[1] Reported in the official newspaper of the Office of Hawaiian Affairs, *Ka Wai Ola O OHA*, Vol. 5, No. 11, Nov., 1988.

[2] The investigative report of the Attorney General of the State of

In response to this attempt to enlarge the class of beneficiaries more than ten-fold, on October 18, 1988, Respondents filed suit for breach of the § 5(f) trust, alleging specific wrongful conduct in paragraph 16, quoted above.

b. Respondents do not concede that Petitioners "have" qualified immunity. On page 12 of the Petition, it is implied that Respondents conceded that Petitioners are entitled to qualified immunity. If this had been so, Respondents would not have appealed, and the decision of the district court would not have been reversed.

c. The questions presented for review were not adequately raised in the courts below. Respondents have made a careful review of the Petitioners' motion to dismiss and reply memorandum, filed in the District Court below, and Petitioners' Reply Brief and Petition for Rehearing, filed in the Court of Appeals. The first appearance of the words "due process" or "qualified immunity" in those documents is in the last two pages of the Petition for Rehearing.

In the Petition for Rehearing, the due process argument comprises one sentence, as follows:

> "Contrary to the panel ruling, this re-casting of the Complaint raises serious and substantial due process problems for the capacity a defendant is sued must be apparent at the actions's onset, *see Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985)." Petition for Rehearing, p. 14

Hawaii, dated November 2, 1988, and signed by Terrence S. Yamamoto and Warren Price, III, counsel for Petitioners herein and below, found that Petitioners expended §5(f) funds to promote "the planned OHA policy and plebiscite regarding a single beneficiary class definition."

The qualified immunity argument is contained in one paragraph, as follows:

> "Indeed, although not discussed in the opinion, the issue of qualified immunity was pressed below by Appellees (*see* C.R. 12 (Mem. at 10) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), and is therefore properly a ground for affirmance. *See Whitley v. Albers*, 475 U.S. 312, 326 (1986); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989). While immunity may undoubtedly be raised on remand as a defense upon a motion for judgment on the pleadings, given that a denial of immunity is immediately appealable, Defendants submit there is no point to sending this case on what, at best, will be 'a brief round trip to the court [] below.' *Lyng v. Northwest Indian Cemetary Protective Ass'n.*, 485 U.S. 439, 447 (1988). As a matter of judicial economy, and, because, in light of the arguments presented in Part 'B' *supra*, there is no doubt that immunity would apply under *Anderson v. Creighton*, 483 635 (1987), rehearing or *en banc* review should be granted, and the judgment affirmed." Petition for Rehearing, p. 15.

The reference in this quotation to CR 12, p. 10 of the District Court record is as follows:

> **"D. This Court Has An Independent Duty To Quickly Terminate Insubstantial Lawsuits. Since The complaint Does Not State A Compensable Claim For Relief, It Should Not Survive A Motion To Dismiss.**
>
> "The key issue of whether congress has imposed the trust duties allegedly violated by the trustees

of OHA has been decided adversely to Plaintiffs in 'Price III.' There are no other substantial federal claims to be resolved in this action. In *Harlow v. Fitzgerald*, 457 U.S. 800, 808, 73 L.Ed.2d 396, 404 (1982), the United States Supreme Court, quoting *Butz v. Economu*, 438 U.S. 478, 57 L.Ed.2d 895 (1978), stated in pertinent part:

> "'Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.' 438 US, at 507-508, 57 L. Ed. 2d 895, 98 S.Ct. 2894 (citations omitted)." CR. 12 (Mem. p. 10).

This being the entire record of argument on these issues below, Respondents respectfully suggest that the issues were raised too late and inadequately developed below to provide the basis for a writ of certiorari herein.

QUESTION ONE

The prayer for relief in the complaint seeks "judgment against Defendants jointly and *severally*". Pet.

App. p. 33a. Petitioners' assertion that the complaint is ambiguous as to the capacity in which they are sued is based on a misunderstanding of the word "severally." "Severally" might seem to be synonymous with the word "jointly", but actually it is synonymous with the word "individually." As defined in Webster's New World Dictionary, Second College Edition (1972), "severally" is an adverb, defined as follows:

> "1. separately; distinctly 2. respectively; *individually*" [Emphasis added.]

Petitioners' prior counsel apparently understood the meaning of "severally", on November 1, 1988, when she filed Petitioners' motion to dismiss the complaint in the District Court, below. There, Petitioners argued:

> "Plaintiffs, for obvious reasons, did not request this Court to impose § 1983 damages against OHA, a governmental agency, or against the named trustees in their official capacities. *It appears that they are attempting to obtain §1983 damages against the trustees as individuals.* They ask for money damages against Defendants jointly and severally." CR. 12, (Mem. p. 8-9). [Italics added, underscore in original.]

The ambiguity in the complaint seems to have developed only recently.

Petitioners now insist that due process requires a specific statement in the complaint telling them what they already knew: that they were being sued for damages in their individual capacities.

Such a rule would be contrary to the liberal pleading practice established by F.R.Civ.Proc., Rule 8(a). It would be a step back to the days before the Rules when

pleading was "a game of skill in which one misstep by counsel may be decisive to the outcome. . . ." *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80, 85-86 (1957).

Moreover, the alleged defect in the complaint of which Petitioners complain, can be easily cured by amendment of the complaint. The question might be rendered moot, if the district court were to grant a motion to amend the complaint while the matter is pending before this court.

Precedent of this Court is clear: that there are two, and only two, allegations that must be pleaded in order to state a claim under § 1983. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The capacity in which the defendants are being sued is not one of them. Petitioners are now asking this court to add a third allegation in order to state a claim.

Respondents relied upon the precedent of *Gomez v. Toledo* in drafting the complaint. CR. 13, (Mem. p. 4). Manifest injustice would result if a new rule were adopted without allowing Respondents to amend their complaint.[1] If the Court grants certiorari, establishes a new rule and then allows Respondents to amend the complaint to comply with the rule, the case will have been delayed and the parties will have been put to a great deal of expense, without any net effect on the

---

[3] In *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) and *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989), cited by Petitioners, the Courts affirmed dismissal without leave to amend. However, the decisions were based on jurisdictional grounds, citing F.R.Civ.Proc., Rule 9(a). A dismissal on grounds of lack of subject matter jurisdiction is not a decision on the merits; and, therefore, does not preclude a new suit, making the proper allegation.

outcome of the case.

If the Court is inclined to adopt a new rule, certiorari should be granted in a case where the Court of Appeals has applied the rule and dismissed the complaint.

QUESTION TWO

In their second question presented for review, Petitioners suggest that the Court of Appeals should have affirmed the decision of the district court in spite of the fact that they had not raised the issue on appeal until their petition for rehearing. This is justified on the grounds that the complaint is allegedly vague and Petitioners' statutory duties are unclear. Respondents disagree on both points.

As noted above, the complaint clearly alleges a breach of the § 5(f) trust on account of expenditure of § 5(f) income to benefit Hawaiians as distinguished from native Hawaiians. This is clearly alleged in paragraph 16 of the complaint. Pet. App., p. 32a.

Under the particular circumstances of this case, it is not necessary to inquire whether the law clearly prohibits such expenditures. This is so, because the trustees did not make these expenditures without advice of counsel. On March 15, 1983, Mr. T. C. Yim, Administrator of the Office of Hawaiian Affairs requested an opinion of the Attorney General of the State of Hawaii on the following question:

> "May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorize OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admission Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes,

Section 10-2(5)?" CR. 13, (Ex. "A", p. 1.).

The answer of the Attorney General was in the negative. Att. Gen. Op. No. 83-2 (1983). A copy of the opinion of the Attorney General is attached as Exhibit "A" to Plaintiffs' memorandum in opposition to the motion to dismiss. CR. 13, Ex. "A".

By this opinion Petitioners were informed that even if the State Legislature purported to authorize them to expend trust monies to benefit Hawaiians (as distinguished from native Hawaiians), that such authorization would be contrary to the trust mandate of § 5(f) of the Admissions Act. Petitioners action in deliberate and considered defiance of this Attorney General opinion was either "plainly incompetent" or a "knowing violation of the law." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

CONCLUSION

For the foregoing important reasons, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit Court of March 21, 1991, and published as *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991).

Dated: Honolulu, Hawaii, July 19, 1991.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Kamuela Price